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No. 02-1619

Supreme Court, U.S.
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In The

# Supreme Court of the United States

JOHN C. LAUTERMILCH,

*Petitioner,*

v.

FINDLAY CITY SCHOOLS,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## BRIEF IN OPPOSITION

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## STATEMENT OF FACTS

In February, 1996, Petitioner Lautermilch began working sporadically as a substitute teacher at Respondent Findlay City Schools. He was never promised that he would be called for any particular number of assignments as a substitute teacher. Neither Lautermilch nor any other substitute teacher signs a contract with Findlay City Schools. Lautermilch was familiar with a Findlay City Schools' document entitled "Guidelines for Substitute Teaching Service" which governed his position as a substitute teacher. The Guidelines set forth a Code of Ethics for Substitute Teachers which includes the statement: "The conduct of the teacher should conform to the accepted patterns of behavior of the most desirable members of the community."

Lautermilch functioned as a substitute teacher in the Findlay City Schools from February 1996 through November 1998. He substituted for all classes and grades in the middle and high school. During that 2½ year period, Findlay City Schools had some concerns about some of Lautermilch's activities. Kathleen Crates, Principal of Findlay High School, had heard that a parent of a handicapped student didn't want her child in class with Lautermilch because of Lautermilch's reputation in the neighborhood of acting inappropriately with some children. Although Crates did not believe the criticism at the time, she certainly remembered it as other issues arose. Crates later was advised that Lautermilch had befriended a female high school student who by all reports was an "at risk" student. Lautermilch on at least two occasions tutored that student at his home after school with no one else present. Crates also became aware of reports that other teachers were upset with Lautermilch for "high-fiving"

students in the hall and there were reports of Lautermilch telling inappropriate jokes in the classroom. At one point it was reported that Lautermilch had commented on the size of a female teacher's breasts.

In November, 1998, the administration at Findlay City Schools became aware that a student had quoted Lautermilch as saying the following:

> Lips who [sic] touch alcohol may not touch mine, but it does not rule out any other part of my body.

The student who reported the statement was asked to put it in writing and two other students verified the statement, at least in part.

Upon learning of the allegation, Principal Crates and Assistant Principal Michael Kuri decided that Lautermilch would not be called for any further substitute jobs until he met with Crates. Kuri left a message on Lautermilch's answering machine telling him that he should not report to school until he met with Crates.

A couple of days later, Crates, Kuri, and Lautermilch met for the specific purpose of discussing the alleged "lips that touch alcohol . . . " comment. However, the other alleged incidents were also discussed. At that meeting, Crates felt, and told Lautermilch, that there was a pattern of behavior which she was concerned about and that she didn't feel comfortable having Lautermilch serve as a substitute teacher. Lautermilch alleges that Crates told him that he was "too macho." Lautermilch was told this decision could be overruled by Dr. Mary Anne Ashworth, the Assistant Superintendent, and Lautermilch was invited to speak to Dr. Ashworth if he so desired.

Lautermilch never spoke to Dr. Ashworth nor has he taken any other action to seek to be reinstated to the substitute teaching list other than filing this lawsuit.

## REASON FOR DENYING THE WRIT

### Lautermilch Has Presented No Evidence Of Reverse Gender Discrimination

Lautermilch contends that he is entitled to a jury trial on his reverse gender discrimination claim based **solely** on the alleged comment that he was "too macho." Lautermilch has presented no other evidence of discrimination and acknowledges that he cannot present a *prima facie* discrimination claim under the *McDonnell Douglas/Burdine* framework. Lautermilch's claim fails for several reasons.

First, the alleged "too macho" comment is not evidence of gender discrimination, rather, it describes inappropriate behavior. Indeed, Lautermilch, Findlay City Schools, and the majority and dissenting opinions of the Court of Appeals agree that "too macho" describes behavior. (Petition, p. 12; Appendix B, pp. 9a-10a, 13a). As noted in the dissenting opinion, "macho" is defined as "tough guy," "aggressively virile," "assertive or aggressive manliness," and "an assertively virile, dominating, or domineering male." (Appendix B, p. 12a). However, the dissent and Lautermilch make an illogical leap that this is direct evidence of gender discrimination because these are " . . . **behaviors** and **qualities** associated with the male gender." (emphasis added) (Appendix B, p. 13a) and then infer that Findlay City Schools were discriminating against Lautermilch because he is male.

This analysis has two fundamental problems. First, "macho" is not used to exclusively describe males. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L. Ed. 268 (1989) (among other stronger evidence of stereotyping, a female is described as "macho"). Additionally, while this behavior may be generally associated with males, it does not follow that "macho" is synonymous with "male." All males are not "macho." Indeed, only a small subset of males are usually described as "macho."

Second, "macho" refers to aggressive, assertive, or domineering behavior, which is generally inappropriate behavior and certainly inappropriate behavior in a public school. However, the analysis urged by Lautermilch ignores the substance of the behavior and would protect this inappropriate behavior simply because it is associated with a gender. This conclusion would be the first step to reviving the universally discredited "boys will be boys" defense to sexual harassment claims or, at a minimum, present employees with a dilemma of how to confront "macho" behavior in the workplace. Taking this theory to an extreme, an employee could maintain a reverse gender discrimination claim for being fired because he is a rapist since rape is "behavior . . . associated with the male gender."

In short, the Sixth Circuit Court of Appeals is correct: "Too macho" describes inappropriate behavior which is not protected merely because it is associated with one gender. The actions taken by Findlay City Schools were based upon Lautermilch's behavior, not his gender, and summary judgment was proper.

Findlay City Schools are also entitled to judgment as a matter of law because "too macho" is insufficient to meet the direct evidence standard. The direct evidence standard

requires that a " . . . plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 276; 109 S.Ct. 1775, 1804; 104 L. Ed. 2d 268, 304 (1989). "Direct evidence is evidence which, if believed, proves the fact without inference or presumption." *Brown v. East Mississippi Electric Power Assn.*, 989 F.2d 858, 861 (5th Cir. 1993); *Accord Carter v. Three Springs Residential Treatment*, 132 F.3d 635, 641 (11th Cir. 1998). A comment which requires an inference to establish an illegal motive is not direct evidence. *Erickson v. Farmland Industries, Inc.*, 271 F.3d 718 (8th Cir. 2001). Ambiguous statements which can be interpreted as either evidence of a discriminatory motive or a benign comment are not direct evidence. *Fernandes v. Costa Brothers Masonry*, 199 F.3d 572, 583 (1st Cir. 1999). Direct evidence requires statements that provide a "high degree of assurance" that a termination was attributable to discrimination. *Id.* at 583; *Patten v. Wal-Mart Stores East*, 300 F.3d 21, 25 (1st Cir. 2002).

In *Fernandes v. Costa Brothers Masonry, Inc., supra*, the direct evidence relied upon were two statements: "I don't need minorities, and I don't need residents on this job" and "I don't have to hire you locals or Cape Verdean people." *Id.* at 583. The First Circuit Court of Appeals, after a thorough analysis of direct evidence standards, held these statements did not constitute sufficient direct evidence to avoid summary judgment because they were inherently ambiguous statements and could be interpreted in two different ways, one discriminatory and the other benign. *Id.* at 581-584. This analysis requiring direct evidence to be not "inherently ambiguous" was reiterated in *Patten v. Wal-Mart Stores East, supra*.

The alleged "too macho" comment made in connection with a discussion about Lautermilch's inappropriate and boorish behavior does not constitute direct evidence as a matter of law. "Too macho" describes Lautermilch's inappropriate behavior which was discussed with Lautermilch at his meeting with Crates and Kuri. At that meeting, Crates and Kuri discussed with Lautermilch complaints about his "lips shall not" quote, Lautermilch telling inappropriate jokes, other teachers being upset with Lautermilch, Lautermilch "high-fiving" other students, tutoring a female "at risk" student at his home after school with no one else present, and Lautermilch's comment on the size of a female teacher's breasts. Given the undisputed specific incidents discussed at the meeting, the "too macho" quote clearly does not provide direct evidence of discrimination because of his gender. Rather, "too macho" describes certain inappropriate behavior.

The "too macho" comment, when viewed in context of all other undisputed facts, was, at best, ambiguous and clearly does not meet the direct evidence standard. No reasonable jury, given the specific complaints discussed with Lautermilch, could conclude that Lautermilch was discriminated against because of his gender based solely on the alleged "too macho" comment.

## Findlay City Schools' Action Did Not Violate Lautermilch's First Amendment Rights

Lautermilch contends that Findlay City Schools violated his First Amendment rights of free speech. As Lautermilch correctly notes, the initial issue is whether the speech is a matter of public concern. Accordingly, the issue is whether Lautermilch's "Lips who [sic] touch

alcohol may not touch mine, but it does not rule out any other part of my body" statement is a matter of public concern. This speech is simply not a matter of public concern, except possible public concern over Lautermilch's judgment or failure of Findlay City Schools to address Lautermilch's inappropriate speech.

The United States Supreme Court holding in *Connick v. Myers*, 461 U.S. 138, 146, 103 S.Ct. 1684, 75 L. Ed. 2d 708 (1983) is dispositive:

> . . . When employee expression cannot be fairly considered as relating to any matter of political, social or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversights by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violates no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for dismissal are alleged to be mistaken or unreasonable.

Accordingly, Lautermilch's First Amendment claim was properly dismissed by the District Court and Court of Appeals.

## CONCLUSION

Respondent Findlay City Schools requests that Petitioner John C. Lautermilch's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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